A **ANGKUTERA SDN BHD v. JURIMBA SDN BHD & ANOR**

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
ZAMANI A RAHIM JCA
ZALEHA YUSOF JCA
B [CIVIL APPEAL NO: A-02(IM)-1010-06-2015]
12 JULY 2016

COMPANY LAW: *Winding up – Liquidator – Sale of property by liquidator – Appellants claiming ownership in property developed by company in liquidation –*
C *Application to vary vesting order – Test to be applied – Whether only properties legally belonging to company in liquidation could vest in liquidator – Where liquidator properly obtained vesting order – Whether applicants failed to act expeditiously to protect their alleged interest – Whether doctrine of laches applied against applicants – Companies Act 1965, ss. 233(2), 279*

D Fenghua Development Sdn Bhd ('Fenghua') owned four parcels of land ('the land') whereby it entered into a joint venture agreement with the second respondent, Aik Aik Holdings Sdn Bhd ('Aik Aik Holdings'), a property developer, for the purpose of developing the land. A building known as Kompleks Aik Aik was built on the land. On 27 July 1991, Angkutera Sdn
E Bhd ('appellant') entered into a sale and purchase agreement with Aik Aik Holdings and Fenghua for the purchase of some units in Kompleks Aik Aik, including the basement car park and rooftop. The Cineplex, the subject matter of the dispute, was located at the rooftop of the Kompleks Aik Aik. The appellant took a loan from Asia Commercial Finance ('ACF') to finance
F the purchase of the rooftop and basement and by a deed of loan cum assignment, the same was assigned to the bank with the Pendaftar of Mahkamah Tinggi Ipoh signing on behalf of the landowner Fenghua. The appellant took possession and occupation of the rooftop including the Cineplex as well as the basement. The loan had been fully repaid and
G satisfied and there was a document entitled receipt and reassignment by the bank to the appellant. Subsequently, a foreclosure proceeding was filed by ACF. However, by virtue of a consent order, it was agreed that the said rooftop and basement inclusive of the Cineplex would be exempted from the foreclosure proceedings instituted by ACF. Aik Aik Holdings was wound up
H on 26 September 1996 and subsequently on 4 May 2010, a liquidator was appointed. The liquidator encountered difficulty in locating the documents pertaining to the assets and properties of Aik Aik Holdings. As there were no records of the units that had been sold in Kompleks Aik Aik, the liquidator conducted a proof of ownership exercise or verification exercise to ascertain this fact. The liquidator then obtained a vesting order on 4 May
I 2010 to vest into the liquidator the unsold units in Kompleks Aik Aik, which included the Cineplex. Four months later, the appellant claimed ownership to the Cineplex and requested that it be excluded from the vesting order. However, the liquidator rejected the appellant's claim and proceeded to sell

the Cineplex to Jurimba Sdn Bhd ('Jurimba'). In the circumstances, the appellant applied pursuant to s. 279 of the Companies Act 1965 ('the Act'), *inter alia*, (i) to vary the vesting order dated 4 May 2010; (ii) a declaration that the sale and purchase agreement between Aik Aik Holdings, Fenghua and Jurimba in respect of the said Cineplex was null and void; and (iii) a declaration that the appellant was the legal and/or beneficial owner of the Cineplex based on a sale and purchase agreement dated 27 July 1991. The High Court dismissed the appellant's application. Hence, the present appeal. The issues that arose for determination, *inter alia*, were (i) whether the High Court was justified in deciding that the appellant had not satisfied the test under s. 279 of the Act to vary the vesting order obtained by the liquidator dated 4 May 2010; and (ii) whether the doctrine of laches applied to defeat the appellant's claim.

Held (allowing appeal with costs; setting aside order of High Court)
Per Zaleha Yusof JCA delivering the judgment of the court:

(1) Section 279 of the Act can be applied if the appellant can show to the court that the act of the liquidator in obtaining the vesting order had wrongfully affected its title to the Cineplex. If the appellant succeeds, under s. 279 of the Act, the court may undo the transaction entered into by the liquidator. (para 17)

(2) The function of the court under s. 279 of the Act was to hear the matter as a strict appeal from the decision of the liquidator. The court could only interfere with the exercise of a liquidator's decision to sell the assets of an insolvent company in very exceptional circumstances and would not do so unless it could be shown that he had acted utterly unreasonably or, though acting in good faith, took into account considerations which he ought not to have taken into account or failed to take into considerations which he ought to have taken into account. (para 18)

(3) Section 233(2) of the Act stipulates that only properties legally belonging to the company in liquidation shall be vested in the liquidator. The owner or proprietor of the land was Fenghua. Fenghua had granted Aik Aik Holdings the right to develop the land as a shopping and office complex and had agreed to the sale of the parcels units in the complex. Therefore, Aik Aik Holding's interest in the land was purely monetary. It was not the owner of the land but Fenghua. This was evidenced when Fenghua was made a party to the sale and purchase agreement and had to give its agreement to the sale. Hence, the vesting order was wrong as the liquidator could only be vested with the property that belonged to Aik Aik Holdings, and the Cineplex did not belong to them. (paras 31 & 33)

(4) The appellant had been in possession of the Cineplex when the liquidator came into the picture. Prior to the sale of the Cineplex by the liquidator to Jurimba, the appellant had written to the liquidator,

claiming ownership to the Cineplex. Yet, the liquidator proceeded with the sale without applying to the court for directions under s. 237(3) of the Act in relation to any particular matter arising under the winding up. (para 37)

(5) The appellant had paid the full purchase price and had been in possession of the property. All that needed to be done was to clothe the appellant with the legal strata title since equity considers that as done which ought to be done. Therefore, laches did not apply to the appellant since the property belonged to the appellant. It was untenable for the liquidator to claim that he filed the application to obtain the said vesting order based on information within his knowledge at that point of time and surrounding circumstances; when all that he did was to write only one single letter to the official receiver. The liquidator had acted utterly unreasonably. As the Cineplex was on the rooftop, it was part of the property purchased by the appellant. (paras 39 & 40)

Bahasa Malaysia *Headnotes*

Fenghua Development Sdn Bhd ('Fenghua') memiliki empat bidang tanah ('tanah') di mana ia memeterai perjanjian usahasama dengan responden kedua, Aik Aik Holdings Sdn Bhd ('Aik Aik Holdings'), pemaju hartanah, bagi tujuan membangunkan tanah tersebut. Sebuah bangunan dikenali sebagai Kompleks Aik Aik telah dibina di atas tanah itu. Pada 27 Julai 1991, Angkutera Sdn Bhd ('perayu') memeterai perjanjian jual beli dengan Aik Aik Holdings dan Fenghua bagi pembelian beberapa unit di Kompleks Aik Aik termasuk tempat letak kereta bawah tanah dan ruangan atas bumbung. Cineplex, perkara pokok pertikaian, terletak di ruangan atas bumbung Kompleks Aik Aik. Perayu mengambil pinjaman daripada Asia Commercial Finance ('ACF') bagi membiayai pembelian ruangan atas bumbung dan bawah tanah dan melalui surat ikatan pinjaman merangkap penyerahakkan dan yang sama diberikan kepada bank dengan Pendaftar Mahkamah Tinggi Ipoh menandatangani bagi pihak pemilik tanah Fenghua. Perayu mengambil milikan dan pendudukan ruangan atas bumbung termasuk Cineplex serta ruangan bawah tanah. Pinjaman telah dibayar sepenuhnya serta dipenuhi dan terdapat dokumen di bawah tajuk penerimaan dan penyerahhakan semula oleh bank kepada perayu. Selanjutnya, prosiding perampasan difailkan oleh ACF. Walau bagaimanapun, menurut perintah persetujuan, adalah dipersetujui bahawa ruangan atas bumbung dan ruangan bawah tanah tersebut merangkumi Cineplex akan dikecualikan daripada prosiding rampasan yang dimulakan oleh ACF. Aik Aik Holdings telah digulung pada 26 September 1996 dan kemudiannya pada 4 Mei 2010, pelikuidasi dilantik. Pelikuidasi berdepan dengan kesukaran dalam mendapatkan dokumen berkaitan dengan aset dan hartanah Aik Aik Holdings. Oleh sebab tiada rekod berkenaan unit yang telah dijual di Kompleks Aik Aik, pelikuidasi menjalankan latihan bukti pemilikan atau latihan pengesahan untuk mengesahkan fakta ini. Pelikuidasi kemudian mendapat perintah letak hak pada 4 Mei 2010 untuk meletak hak kepada pelikuidasi, unit tidak terjual di Kompleks Aik Aik,

termasuk Cineplex. Empat bulan kemudian, perayu mendakwa pemilikan kepada Cineplex dan meminta ia dikecualikan daripada perintah peletakhakan itu. Walau bagaimanapun, pelikuidasi menolak tuntutan perayu dan seterusnya menjual Cineplex kepada Jurimba Sdn Bhd ('Jurimba'). Dalam hal keadaan ini, perayu memohon melalui s. 279 Akta Syarikat 1965 ('Akta'), antara lain, (i) untuk meminda perintah letak hak bertarikh 4 Mei 2010; (ii) deklarasi bahawa perjanjian jual beli antara Aik Aik Holdings, Fenghua dan Jurimba berkenaan dengan Cineplex adalah batal dan tidak sah; dan (iii) deklarasi bahawa perayu adalah pemilik sah dan/atau benefisial Cineplex berdasarkan perjanjian jual beli bertarikh 27 Julai 1991. Mahkamah Tinggi menolak permohonan perayu. Oleh itu, rayuan ini. Isu-isu yang berbangkit bagi penentuan, antara lain, adalah (i) sama ada adalah wajar untuk Mahkamah Tinggi menentukan bahawa perayu tidak memenuhi ujian di bawah s. 279 Akta untuk meminda perintah letak hak yang diperolehi oleh pelikuidasi bertarikh 4 Mei 2010; dan (ii) sama ada doktrin kelengahan digunakan untuk mematahkan tuntutan perayu.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Tinggi)
Oleh Zaleha Yusof HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 279 Akta boleh diaplikasikan jika perayu boleh menunjukkan kepada mahkamah bahawa tindakan pelikuidasi dalam mendapatkan perintah peletakhakan telah secara salah menjejaskan hak milik kepada Cineplex. Jika perayu berjaya, di bawah s. 279 Akta, mahkamah boleh membatalkan transaksi yang dibuat oleh pelikuidasi.

(2) Fungsi mahkamah di bawah s. 279 Akta adalah untuk mendengar hal perkara itu sebagai rayuan ketat dari keputusan penyelesai. Mahkamah hanya boleh campur tangan dengan pelaksanaan keputusan pelikuidasi untuk menjual aset syarikat insolven dalam berkeadaan luar biasa dan kegagalan berbuat demikian melainkan jika ditunjukkan bahawa dia bertindak secara tidak munasabah atau, walaupun bertindak dengan niat baik, mengambil kira pertimbangan yang mana dia tidak sepatutnya mengambil kira atau gagal mengambil pertimbangan yang mana dia sepatutnya ambil kira.

(3) Seksyen 233(2) Akta menetapkan bahawa hanya hartanah yang dimiliki secara sah kepada syarikat yang telah dibubarkan terletak hak kepada pelikuidasi. Pemilik atau tuan punya tanah adalah Fenghua. Fenghua telah memberi Aik Aik Holdings hak untuk membangunkan tanah tersebut sebagai kompleks membeli-belah dan pejabat dan bersetuju dengan jualan unit di kompleks tersebut. Oleh itu, kepentingan Aik Aik Holdings di tanah itu adalah bersifat kewangan. Ia bukan pemilik tanah itu tetapi Fenghua. Ini terbukti apabila Fenghua dijadikan pihak kepada perjanjian jual beli dan terpaksa memberi persetujuan untuk jualan. Maka, perintah peletakhakan itu adalah salah kerana pelikuidasi hanya meletak hak terhadap hartanah yang dimiliki oleh Aik Aik Holdings, dan Cineplex bukan milik mereka.

(4) Perayu telah berada dalam milikan Cineplex apabila pelikuidasi timbul. Sebelum jualan Cineplex oleh pelikuidasi kepada Jurimba, perayu menulis kepada pelikuidasi, mendakwa pemilikan terhadap Cineplex. Namun, pelikuidasi meneruskan jualan tanpa memohon kepada mahkamah untuk arahan di bawah s. 237(3) Akta berkenaan dengan apa-apa perkara yang berbangkit di bawah penggulungan.

(5) Perayu telah membayar harga pembelian sepenuhnya dan memiliki harta tersebut. Apa yang perlu dilakukan adalah untuk memberi hak kepada perayu dengan hak milik strata sah kerana ekuiti menganggapnya dilakukan yang mana ia sepatutnya dilakukan. Oleh itu, kelengahan tidak terpakai terhadap perayu kerana hartanah itu adalah milik perayu. Tidak wajar bagi pelikuidasi untuk menuntut bahawa dia memfailkan permohonan itu bagi mendapatkan perintah peletakhakan tersebut berdasarkan maklumat dalam pengetahuannya pada ketika itu dan keadaan sekeliling; apabila apa yang hanya dilakukannya adalah menulis sepucuk surat kepada pegawai penerima. Pelikuidasi sama sekali bertindak secara tidak munasabah. Oleh kerana Cineplex berada di ruangan atas bumbung, ia adalah sebahagian daripada hartanah yang dibeli perayu.

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (Formerly known as Time Engineering Sdn Bhd) [1996] 2 CLJ 561 FC ***(refd)***

Chin Ah Keow @ Chin Lai Sitt v. Anggun Pintas Sdn Bhd & Ors [2005] 1 LNS 92 HC ***(refd)***

Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor [2011] 5 CLJ 136 FC ***(refd)***

In Re Edennote Ltd; Tottenham Hotspur plc v. Ryman ChD [1995] 2 BCLC 248 ***(refd)***

Kersah La'Uisn v. Sikin Menan [1964] 1 LNS 57 HC ***(refd)***

Tan Geok Teck & Yang Lain v. Upaya Kelana (M) Sdn Bhd [2007] 3 CLJ 312 CA ***(refd)***

Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors [1974] 1 LNS 175 FC ***(refd)***

Wong Siew Choong Sdn Bhd v. Anvest Corporation Sdn Bhd [2004] 4 CLJ 89 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 233(2), 234, 237(3), 249, 250, 279, 350
Rules of Court 2012, O. 62

Insolvency Act 1986 [UK], s. 168(5)

Other source(s) referred to:

Andrew R Keay, *McPherson's Law of Company - Liquidation*, 3rd edn, pp 603-604

For the appellant - Gurbachan Singh & Rabinder Singh; M/s Bachan & Kartar
For the respondents - V Vijaya Segaran; M/s Maxwell Kenion Cowdy & Jones - Sabrina Richards; M/s Ros Lee & Co

[Editor's note: For the High Court judgment, please see North Malaya Engineers Trading Co Sdn Bhd v. Aik Aik Holdings Sdn Bhd [2014] 4 CLJ 629 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Zaleha Yusof JCA:

[1] The appellant, Angkutera Sdn Bhd, is appealing against part of the decision of the learned Judicial Commissioner (JC) of the High Court at Ipoh in dismissing prayers (2), (3), (4), and (5) of its summons in chambers filed pursuant to s. 279 of the Companies Act 1965; which briefly sought for the following orders:

(a) to vary a vesting order dated 4 May 2010 whereby a property referred to as the Cineplex roof level, in Kompleks Aik Aik Building, Teluk Intan was vested in the liquidator of Aik Aik Holdings Sdn Bhd (Aik Aik Holdings);

(b) a declaration that the liquidator of Aik Aik Holdings had no power to sell, transfer, lease or charge the Cineplex property;

(c) a declaration that the sale and purchase agreement between Aik Aik Holdings, Fenghua Development Sdn Bhd (Fenghua) and Jurimba Sdn Bhd (Jurimba) in respect of the said Cineplex is null and void; and

(d) a declaration that the appellant is the legal and or beneficial owner of the said Cineplex based on a sale and purchase agreement dated 27 July 1991.

[2] We had, after perusing the records of appeal and hearing and considering the submissions of learned counsel of the parties written as well as oral, allowed the appeal. We now give our reasons for allowing the appeal.

Background Facts

[3] Fenghua owned four parcels of land ("the land") in Teluk Intan. It entered into a joint venture agreement with Aik Aik Holdings, a property developer, for the purpose of developing the land. A building known as Kompleks Aik Aik was built on the land in question.

[4] On 27 July 1991, the appellant entered into a sale and purchase agreement with Aik Aik Holdings and Fenghua for the purchase of some units in Kompleks Aik Aik, including the basement car park and rooftop for RM500,000. The Cineplex, the subject matter of the dispute, is located at the rooftop of the Kompleks Aik Aik. The appellant took a loan from Asia Commercial Finance (ACF) to finance the purchase of the rooftop and basement and by a deed of loan cum assignment dated 4 September 1991 the same was assigned to the bank with the Pendaftar of Mahkamah Tinggi Ipoh signing on behalf of the landowner Fenghua. The appellant took possession and occupation of the rooftop including the Cineplex as well as the basement. The loan has been fully repaid and satisfied on 7 March 2005 and there was a document entitled 'Receipt and Reassignment' by the bank to the appellant. Thereafter the said property was then rented out by the appellant and the rental was further extended for two years. By way of a foreclosure proceeding

vide Originating Summons No. 31-710-1988 filed by ACF agreement a consent judgment was recorded on 17 August 2000. By virtue of the said consent order dated 17 August 2000, it was agreed that the said rooftop and basement inclusive of the Cineplex would be exempted from the foreclosure proceedings instituted by ACF.

[5] Aik Aik Holdings was wound up on 26 September 1996 and the official receiver was appointed as the provisional liquidator.

[6] On 4 May 2010, Jambulingam Sethuraman Raki was appointed as liquidator, replacing the official receiver.

[7] The liquidator encountered difficulty in locating the documents pertaining to the assets and properties of Aik Aik Holdings. As there were no records of the units that had been sold in Kompleks Aik Aik, the liquidator conducted a proof of ownership exercise or verification exercise to ascertain this fact.

[8] On 4 May 2010, the liquidator obtained a vesting order to vest into the liquidator the unsold units in Kompleks Aik Aik and the Cineplex.

[9] About four months after the vesting order was made, the appellant, by letters dated 8 September 2010, 15 September 2010 and 21 September 2010, claimed ownership to the Cineplex and requested that it be excluded from the vesting order. However, the liquidator had rejected the claim on the ground that the documents furnished did not support its claim and that the liquidator would proceed to sell it.

[10] On 13 December 2010, Jurimba purchased the Cineplex for RM120,000 from the liquidator.

[11] On 20 May 2014, Jurimba brought a Civil Action No. 22NCVC-52-05-2014 against the appellant to recover vacant possession of the Cineplex. The appellant filed a defence and counterclaim on 3 August 2014 alleging fraud by Aik Aik Holdings through the liquidator and Fenghua. It claimed that it had a better title to the Cineplex as it had made the purchase prior to the transaction between the liquidator and Jurimba. By its counterclaim, the appellant sought for the sale to Jurimba to be set aside and other consequential and ancillary orders.

[12] On 5 February 2015, the appellant filed a summons in chambers in encl. G to intervene in the winding up proceedings of Aik Aik Holdings and to vary the vesting order as stated above.

Decision Of The Learned JC

[13] The learned JC in her decision, was satisfied that the verification exercise undertaken by the liquidator was conducted properly and with sufficient notices, letters and advertisements sent out regarding the same. Her Ladyship found that the appellant did not make any claim to the Cineplex when it attended the verification exercise. And having participated in the

verification exercise, it was not open to the appellant to allege that the failure of the liquidator to send letter on the exercise, by registered post, rendered the verification exercise unlawful. Her Ladyship was of the view that the complaint by the appellant that it was not notified of the verification exercise was baseless. She further opined that it was not right to say that Aik Aik Holdings had acquired no title or interest in the units in Kompleks Aik Aik as the joint venture agreement was not produced to support the allegation made. Her Ladyship concluded that the appellant had failed to demonstrate to the court that the liquidator had acted unreasonably or in bad faith and that the verification exercise that he undertook was not proper. Hence, its application under s. 279 of the Companies Act 1965 ought to be dismissed.

[14] The learned JC was also of the view that the doctrine of laches applied as the appellant, being aware of the vesting order since September 2010, had stood by and permitted the liquidator to proceed with the sale of Cineplex. The appellant had proffered no explanation for its inaction and the inaction, in Her Ladyship's view, demonstrates that it had acquiesced in the conduct complained of and its complaint therefore was not made in good faith.

Issues

(i) Whether the learned JC was justified in deciding that the appellant had not satisfied the test under s. 279 of the Companies Act 1965 to vary the vesting order obtained by the liquidator dated 4 May 2010; and

(ii) Does laches apply to defeat any claim the appellant may have had?

Our Decision

[15] Section 279 of the Companies Act 1965 (Act 125) provides for the right of appeal against decision of a liquidator. It reads:

> Any person aggrieved by any act or decision of the liquidator may apply to the court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

[16] Our s. 279 of Act 125 has its equivalent provisions in s. 168(5) of English Insolvency Act 1986. *McPherson's Law of Company - Liquidation* 3rd edn by Andrew R Keay at pp. 603 to 604 discusses the provisions as follows:

> The jurisdiction conferred by s. 168(5) in relation to compulsory liquidation (and to voluntary liquidation through s. 112) can only be exercised in consequence of an application by a person who is aggrieved by an act, omission or decision of the liquidator ...
>
> The classic definition is that in *Ex p Sidebotham*, where James L.J. expressed the view that, for a person to be aggrieved, that person must be:
>
> > a man who has suffered a legal grievance, a man against whom a decision has been pronounced **which was wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something**.

> Also included is someone who is directly affected by the exercise of a liquidator's power and otherwise would not be able to challenge that exercise of power, such as a person affected by a disclaimer of company property.
>
> The applicant has the onus of proving that the decision of the liquidator was wrong and he or she should demonstrate in a supporting affidavit that the application has merit by setting out in the affidavit facts which should give rise to an argument ...
>
> **If an application can be brought under s. 168(5), the court is entitled, if the circumstances so demand, to undo a transaction entered into by a liquidator**. (emphasis added)

[17] It is thus clear that s. 279 can be applied if the appellant can show to the court that the act of the liquidator in obtaining the vesting order had wrongfully affected its title to the Cineplex. If the appellant succeeds, under s. 279 the court may undo the transaction entered into by the liquidator.

[18] In *Chin Ah Keow @ Chin Lai Sitt v. Anggun Pintas Sdn Bhd & Ors* [2005] 1 LNS 92; [2005] 4 MLJ 747, at p. 756, the court held that the function of the court under s. 279 of Act 125 was to hear the matter as a strict appeal from the decision of the liquidator. The powers given to the court were to consider whether the act or decision of the liquidator was right or otherwise. To do this the court must have regard to the circumstances which were before the liquidator at the time of his act or decision and not to circumstances subsequently arising. The court in *Chin Ah Keow*, *supra*, had followed the test applied in *In Re Edennote Ltd; Tottenham Hotspur plc v. Ryman ChD* [1995] 2 BCLC 248 where it was held that the court could only interfere with the exercise of a liquidator's decision to sell the assets of an insolvent company in very exceptional circumstances and would not do so unless it could be shown that he had acted utterly unreasonably or, though acting in good faith took into account considerations which he ought not to have taken into account or failed to take into considerations which he ought to have taken into account.

[19] First we would proceed to examine whether the liquidator herein had acted reasonably and had taken into account relevant matters before making the application which resulted in the vesting order dated 4 May 2010.

[20] The liquidator, in his affidavit dated 27 March 2015 stated that he was appointed 12 years after the winding up of Aik Aik Holdings and had difficulties in locating all documents pertaining to the assets and/or properties of Aik Aik Holdings, records of sales and purchase transactions entered between Aik Aik Holdings and the purchasers prior to the liquidator etc. In exh. 'JR 10' he showed a letter written to the official receiver (OR) requesting the OR to give him all documents in OR's possession to him pertaining to Aik Aik Holdings; and the only documents given to him are six proof of debt forms. Since there was no record of the sales and purchase transactions, the ownership exercise and verification was commenced by the liquidator.

[21] It would appear that the liquidator had relied on that one letter JR10, written to the OR, to justify the commencement of the ownership exercise. There are in fact a number of provisions in Act 125 which confers enough powers to a liquidator to gather the requisite information regarding not only the financial position of a company that is being wound up, but also its affairs with a view to facilitating the consolidation of the assets and properties of the company; in this case Aik Aik Holdings. In this regard, ss. 234, 249 and 250 are very relevant. There is no evidence to show that the liquidator had invoked statutory provisions as provided by ss. 234, 249 and 250 of Act 125 to ascertain the documentation. There is also no evidence that officers of Aik Aik Holdings had been summoned for that purpose.

[22] Further the provisions of the sale and purchase agreement itself are very telling, especially cls. 6 and 11 which *inter alia* are as follows:

> 6. The Vendor shall apply to the relevant authority under Chapter 4 of Part 9 of the National Land Code (Act 56 of 1965) for the issue of a separate subsidiary title to the said Unit and until the issue of such aforesaid subsidiary title the Vendor hereby confirms that this Agreement shall be deemed to be evidence of the Purchaser's title right and interest in the said Unit subject to the terms and conditions of this agreement.
>
> 11. Possession of the said Unit will not be given to the Purchaser until after the execution of this Agreement and upon the Purchaser having duly paid to the Vendor all moneys payable in accordance with the terms of this Agreement and the Purchaser having duly complied with the terms and covenants on his part to be observed in this Agreement.

[23] Those two clauses show that the agreement recognises the purchaser's title right and interest in the unit; and one can only have possession of the unit if he has executed the agreement and duly paid all monies payable. There is evidence that the appellant had been in possession of the unit. So, did not it occur to the liquidator how could the appellant be in possession if he had no interest in the unit?

[24] Page 116 of the appeal record (B&C) Vol. 1 shows the document of receipt and assignment where at p. 117 it shows that full payment had already been made.

[25] The learned JC had made the finding that the appellant did attend the verification exercise. Having participated in the verification exercise, it is not open to the appellant to challenge the validity of the verification exercise on that the failure of the liquidator to send the three letters by registered post. We have scrutinised the record of appeal and with due respect to the learned JC, we were unable to find any evidence to show that the appellant did attend the verification meeting. The only evidence which was near to it was para. 10(c) of the affidavit in reply of the liquidator dated 27 March 2015 which *inter alia* says that letters were sent and a meeting was held to explain

to all present including the appellant of verification exercise. However there was no evidence to show who was present at that meeting. And the appellant in para. 5 of its affidavit dated 3 April 2015, denied its presence at that verification exercise.

[26] It is the appellant's pleaded case that it never received the letters in exh. JR3 purportedly sent by the liquidator upon which learned counsel for the appellant submitted there was no notification. We noted that the letters were indeed sent by certificate of posting. The appellant is a company. Section 350 of Act 125 provides that a document may be served on a company by leaving it at or sending it by registered post to the registered office of the company. The same requirement of registered posting on body corporate can also be found in O. 62 of the Rules of Court 2012. Hence, we are of the view that since there was no evidence that letters were sent by AR registered post and the fact that there was no proof of service, would cast doubt on service of the letters on the appellant by the liquidator.

[27] Hence we opined, there was clear non-compliance on the part of the liquidator in respect of service of documents at the appellant's registered office. We therefore found that the learned JC erred when she found that the appellant had been properly notified and was present during the verification exercise; and that the verification exercise undertaken by the liquidator was conducted properly.

[28] The power of court to grant the vesting order upon an application by the liquidator is stipulated under s. 233(2) of Act 125. Section 233(2) provides that the court may, on application of the liquidator, by order direct that all or any part of the property whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator. That means, the vesting order as envisaged by s. 233(2), can only be made if the property in fact belongs to the company, in this case Aik Aik Holdings.

[29] Learned counsel for the appellant submitted that Aik Aik Holdings was only a developer of the project in joint venture with the land owner Fenghua and therefore Aik Aik Holdings had no interest in the land neither legal nor equitable. He further submitted that the appellant, having paid the full purchase price and taken possession of the Cineplex, was the legal and beneficial owner of the Cineplex. The agreement shows that the appellant had purchased the whole rooftop and the Cineplex situated on the rooftop. He argued that it is settled law that when a valid contract for the sale of land has been executed, the vendor becomes in equity a trustee for the purchaser of the land and the beneficial ownership passes to the purchaser of the said land, in this case, the appellant. Learned counsel for the appellant urged this court to follow the Federal Court's decision in *Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor* [2011] 5 CLJ 136. He further argued that the liquidator cannot vest in it property, in this case, the Cineplex, which does not belong to Aik Aik Holdings.

[30] Learned counsel for Jurimba argued that the learned JC was correct as "roof level" does not necessarily include the Cineplex. For the liquidator it was argued that looking at the sale and purchase agreement, only car park and vacant rooftop were mentioned. Therefore there was no proof that the appellant had purchase the Cineplex. She further argued that the issue of trust only arises if the liquidator had given the appellant a duly executed, valid and registrable transfer in due form. To support the argument, she cited two Federal Court's decision of *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad (Formerly known as Time Engineering Sdn Bhd)* [1996] 2 CLJ 561; [1996] 2 MLJ 12 and also *Wong Siew Choong Sdn Bhd v. Anvest Corporation Sdn Bhd* [2004] 4 CLJ 89. In *Wong Siew Choong*, *supra*, it was held *inter alia*:

> The decision of the Federal Court in *Borneo Housing Finance Bhd v. Time Engineering Bhd* prevails over all other decisions on the point of when a vendor of land becomes a bare trustee for the purchaser. In the present case, the evidence showed that a duly executed valid and registered transfer of the subject and land in favour of the respondent had yet to be executed at the time of acquisition. For this reason, the appellant had not divested itself of the beneficial interest in the subject land at the time of acquisition. Hence, the acquisition award rightfully belonged to the appellant.

[31] We had considered very carefully the submissions made by the parties. We agree with learned counsel for the appellant that s. 233(2) of Act 125 stipulates that what shall vest in the liquidator are only properties legally belong to the company in liquidation. It must not be forgotten that the owner or proprietor of the land is Fenghua. The preamble of the agreement shows that Fenghua had granted Aik Aik Holdings the right to develop the land as a shopping and office complex and had agreed to the sale of the parcels units in the complex. Even the learned JC in her ground of judgment had earlier found that Fenghua had entered into a joint venture agreement with Aik Aik Holdings for the purpose of developing the land.

[32] In *Tan Geok Teck & Yang Lain lwn. Upaya Kelana (M) Sdn Bhd* [2007] 3 CLJ 312; [2007] 3 MLJ 497, the defendant had entered a caveat on the plaintiff's land on the ground that it had interest in the said land based on a joint venture agreement and a supplementary agreement signed between the plaintiff's late mother and the defendant. The Court of Appeal held *inter alia*:

> (1) There are many authorities established that a joint venture agreement to develop a land and divide the proceeds from the said development does not give rise to a caveatable interest (see *Hew Sook Ying v. Hiw Tin Hee* [1992] 2 MLJ 189; *Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor* [2003] 3 MLJ 522). In this case before the court, It is clear that the defendant entered the caveat on the said land based only on the joint venture agreement and supplementary agreement to extend the time for the defendant to complete the joint venture on the said land. Hence the defendant had not right to enter a caveat on the said land (see 10, 14).

A (2) ...

(3) It is clear that the defendant's interest is purely financial. This does not give the defendant a caveatable interest as was stated in the case of *Trans-Summit Sdn Bhd v. Chun Nyook Lin* [1995] 2 MLJ 247.

B **[33]** We agree with the above decision, we are of the view that Aik Aik Holding's interest in the land is purely monetary. It is not the owner of the land but Fenghua is. This is evidenced when Fenghua was made a party to the sale and purchase agreement and had to give its agreement to the sale. Not only the sale and purchase agreement with the appellant but also later when the liquidator sold it to Jurimba. Hence, we agree with the appellant C that the vesting order was wrong as the liquidator can only be vested with the property that belongs to Aik Aik Holdings and the Cineplex did not belong to them.

[34] In *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 1 LNS 175; [1974] 2 MLJ 45, Ong FJ stated:

D

As was said by Jessel M.R. in *Lysaght v. Edwards* (1876) 2 Ch D 499 at p 506: "… the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale E the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.

F

I would quote first the headnote to *Williams v. Greatrex* [1957] 1 WLR 31 at p 36:

> Held, (3) That the purchaser, having paid the deposits on and having entered into possession of the land, became the equitable owner of the land under a contract binding on the vendor.

G

Denning L.J. said in that case:

> If he wished to exclude the purchaser, he ought to have taken possession himself. He never did so. I am quite clearly of opinion that, as long as the purchaser remained in possession under a contract which entitled him to be there, he had an equity which H the courts will protect. There was no need for him to claim specific performance in order to give him a right to be there. Laches or delay is not a bar to this action.

… The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare I trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

[35] In *Hassan Kadir*, *supra*, the Federal Court, held: A

> The courts below were correct in finding that a constructive trust came into existence upon the execution of the Deed of Sale. This was in line with the common law principle that the Deed of Sale would entitle the plaintiff to specific performance and this in turn activated the equitable principle that equity looks upon as done that which ought to have been done. The defendants must hold the said portion subject to the constructive trust in favour of the plaintiffs pursuant to the terms of the Deed of Sale. B

[36] We agree with learned counsel for the appellant that although *Hassan Kadir*'s decision, *supra*, contradicts *Borneo Housing*'s, *supra*, *Hassan Kadir*, *supra*, being the later Federal Court case must prevail. In this instant appeal, there was clear proof that the appellant had not only paid the purchase price with Aik Aik Holdings in full but had also settled the bank loan. Therefore the appellant cannot be denied of its right as a beneficial owner of the property. The appellant had bought the entire rooftop. Hence, it doesn't make sense for the Cineplex to be excluded. C D

[37] Further, the appellant had been in possession of the Cineplex when the liquidator came into the picture. It has also been shown to the court, that prior to the sale of the Cineplex by the liquidator to Jurimba, the appellant had written to the liquidator, claiming ownership to the Cineplex. The sale and purchase agreement dated 27 July 1991, the deed of assignment cum loan agreement dated 4 September 1991 and the deed of receipt and reassignment dated 7 March 2005 were all forwarded to him. And yet the liquidator proceeded with the sale. Under s. 237(3) of Act 125, the liquidator may apply to the court for directions in relation to any particular matter arising under the winding up. We feel any reasonable and prudent liquidator would take this step, to refer to the court, when facing with this type of situation. Interestingly we note that the High Court in another order dated 31 October 2013, after the vesting order, found the appellant herein to be the legal and beneficial owner of another unit at Aik Aik Complex namely Unit No. A1-11. Crucially that order was made pursuant to an application for direction filed by the liquidator. The reason given by the liquidator as to why the application was made was that there were partial documents received from the appellant but in this instant case, there was no proof of ownership. We were perplexed by this reason! It is as though no documents shown to the liquidator when in actual fact the appellant had, as stated above, given the liquidator a certified copy of the sale and purchase agreement dated 27 July 1991; a certified copy of the deed of agreement cum loan agreement dated 4 September 1991 and a certified copy of the receipt and reassignment dated 7 March 2005. On top, the appellant was in occupation of the unit in dispute. So, was there not enough reason to get the court's direction as well? E F G H I

[38] On laches, we are of the view that the case of *Kersah La'Uisn v. Sikin Menan* [1964] 1 LNS 57; [1966] 2 MLJ 20 as cited by learned counsel for the appellant is aptly applicable. It was held in that case that there had been no laches on the part of the defendant who was in possession of the land and he was entitled to delivery of the title deed so that he could perfect his title. At p. 23, Raja Azlan Shah J (as His Lordship was then) had this to say:

> It may be argued, perhaps, in due course, that laches or delay may be a bar to the personal representative's claim. In answer I would rely on the case of *Williams Greatrex* [1957] 1 WLR 31. I need not go into the details of that case beyond saying that it was an action for specific performance of a contract for the sale of land *simpliciter* made 10 years previously. On behalf of the vendor it was argued that when he repudiated the contract the purchaser ought to have brought an action for specific performance then and there to compel him to perform the contract, Denning L.J. (as he then was) said at page 36:
>
> > A very long time elapsed without his taking the vendor to court.
> >
> > *But I think the answer to it is this: once the purchaser went into possession of the land, having the contractual right to be there, he not only had an equity to be there, but also the benefit of a contract to sell him these two plots. That was not only an equity: It was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he does not lose his rights simply by not proceeding at once for specific performance.*
>
> And in a later paragraph of the same page:
>
> > There is an interesting passage which Mr. Pennant read us from a case in 1806, *Crofton v. Ormsby* (1806), 2 Sah and Lef 583, in which Lord Redesdale, Lord Chancellor in Ireland, said: *'The whole laches here consists in the not clothing an equitable estate with a legal title, and that by a party in possession. Now I do not conceive that this is that species of laches, which will prevail against the equitable title; if I should hold it so, it would tend to overset a great deal of property in this country, where parties often continue to hold under on equitable contract for 40 to 50 years, without clothing it with the legal title*. I conceive, therefore, that possession having gone with the contract, there is no room for the objection'. And then he added: '*But, in the present case, there is nothing but a vesting on the equitable estate by a person in possession, without clothing it with the legal title, which I think never was held to be that sort of laches that would prevent relief*'. Likewise we have here possession which is taken under a contract of purchase with an equitable right to be there. All that needs to be done is for the legal title to be perfected. In such a case, laches or delay is not a bar. (emphasis added)

[39] The appellant had paid the full purchase price and had been in possession of the property. All that needs to be done is to clothe the appellant with the legal strata title since equity considers that as done which ought to be done. We agreed with learned counsel for the appellant that laches do not apply when the property obviously belongs to the appellant.

Conclusion

[40] In conclusion, we were of the view that it was untenable for the liquidator to claim that he filed the application to obtain the said vesting order based on information within his knowledge at that point of time and surrounding circumstances; when all that he did was to write only one single letter to the official receiver. He could also not rely on the advertisement on the newspaper, when on his part, it was evidenced that no thorough investigation was done when Act 125 confers on a liquidator enough powers to gather relevant information. It was therefore our considered view that the liquidator had acted utterly unreasonably and that he had failed to take into considerations which he ought to have taken into account. We agree with learned counsel for the appellant that as the Cineplex is on the rooftop, it is part of the property purchased by the appellant. We found there were merits in this appeal that deserved our appellate intervention. In the circumstances, we allowed this appeal with costs and set aside the order of the High Court. The prayers sought by the appellant as its summons in chambers are hereby allowed.